Siva Kalisvaran a/l Sundramurthi v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–353–12 OF 2011
AZAHAR MOHAMED, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
7 JANUARY 2014

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Murder — Whether trial judge failed to appreciate defence case — Whether prosecution's case proved beyond reasonable doubt — Whether accused raised any reasonable doubt — Whether safe to uphold conviction

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The appellant was charged under s 300(c) of the Penal Code ('Code') for slashing his brother in law ('the deceased') to death with a knife. It was the prosecution's case, that while the appellant and his family were watching television, the deceased had entered the house. A commotion had then broken out that resulted in the appellant causing the fatal injury. The trial judge found that the evidence as well as the defence showed that it was the appellant who caused the death. The appellant was convicted of murder and sentenced to death, and hence this appeal. In his appeal the appellant submitted, inter alia, that the trial judge had erred in law and in fact when he decided that the prosecution had succeeded in proving a prima facie case against the appellant; when he failed to consider that the appellant's action amounted to the right of self-defence or the defence of grave and sudden provocation; and when he failed to consider material and relevant matters but sought to convict the appellant on circumstantial evidence. The appellant further submitted that as there was conflicting evidence as to how the incident happened, the trial judge ought to have adopted the version most favourable to the appellant.

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Held, dismissing the appeal:

(1) There were no merits in the appellant's defence of self defence. In the instant case, the deceased was not an outsider intruding into the premises but the appellant's own brother in law. In the light of the injury inflicted, which was punitive in nature, it was difficult for any reasonable tribunal to find that the appellant was exercising his right of self defence as provided for in s 96 of the Code (see para 10).

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(2) After considering the grounds raised by the appellant in his petition of appeal it was clear that there were no merits in the present appeal (see para 11).

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(3) There was sufficient material to support the charge and the view taken by

A the trial court on the relevant issues was a reasonable view of the evidence on record. In the circumstances, it was clear that the court had followed *Radhi*'s direction, and rightly applied the maximum evaluation and the beyond reasonable doubt test. As such, the decision was safe and did not warrant appellate intervention (see para 12).

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[Bahasa Malaysia summary

Perayu dituduh di bawah s 300(c) Kanun Keseksaan kerana menyelar abang iparnya ('si mati') hingga mati dengan pisau. Adalah kes pendakwaan bahawa
C semasa perayu dan keluarganya menonton television, si mati memasuki rumah. Kekecohan berlaku telah mengakibatkan perayu menyebabkan kecederaan yang tidak dapat dielakkan. Hakim perbicaraan mendapati bahawa keterangan dan juga pembelaan menunjukkan bahawa ia adalah perayu yang menyebabkan kematian. Perayu disabitkan dengan pembunuhan dan
D dihukum mati, maka rayuan ini. Dalam rayuannya, perayu berhujah, antara lain, bahawa hakim perbicaraan tersilap dari segi undang-undang dan fakta apabila beliau memutuskan bahawa pendakwaan telah berjaya membuktikan kes prima facie terhadap perayu; apabila dia gagal untuk mempertimbangkan bahawa tindakan perayu merupakan hak kepada mempertahankan diri atau
E pembelaan provokasi bangkitan marah besar dan mengejut; dan apabila dia gagal untuk mempertimbangkan perkara relevan dan material tetapi memohon untuk menyabit perayu atas keterangan keadaan. Perayu selanjutnya berhujah bahawa memandangkan terdapat keterangan bercanggah terhadap bagaimana kejadian tersebut berlaku, hakim perbicaraan patut
F menggunakan versi yang lebih memihak kepada perayu.

Diputuskan, menolak rayuan:

(1) Tidak terdapat merit dalam pembelaan perayu terhadap
G mempertahankan diri. Dalam kes ini, si mati bukan orang luar yang memasuki premis tetapi abang ipar perayu sendiri. Berdasarkan kecederaan yang diakibatkan, yang mana adalah bersifat punitif, adalah sukar bagi mana-mana tribunal yang munasabah untuk memutuskan bahawa perayu menjalankan haknya untuk mempertahankan diri seperti
H yang diperuntukkan di dalam s 96 Kanun (lihat perenggan 10).

(2) Selepas mempertimbangkan alasan-alasan yang dibangkitkan oleh perayu dalam petisyen rayuannya adalah jelas bahawa tidak terdapat merit dalam rayuan ini (lihat perenggan 11).

I (3) Terdapat material yang mencukupi untuk menyokong tuduhan dan pandangan yang diambil oleh mahkamah perbicaraan atas isu yang relevan adalah pandangan munasabah terhadap keterangan dalam rekod. Dalam keadaan ini, adalah jelas bahawa mahkamah telah mengikut haluan *Radhi*, dan secara betul memohon penilaian maksimum dan ujian

melampaui keraguan munasabah. Dengan itu, keputusan adalah selamat dan tidak mewajarkan campur tangan mahkamah rayuan (lihat perenggan 12).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Alandu a/l Santhanasamy v PP [2014] 2 MLJ 508, CA (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)
Mohamad Radhi bin Yakoob v PP [1991] 3 MLJ 169, SC (folld)
Pramod Mandal v State of Bihar [2004] 4 LRI 24, SC (refd)
PP v Thenegaran a/l Murugan [2013] 3 MLJ 328, CA (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)

Legislation referred to

Criminal Procedure Code ss 112, 113(1)
Penal Code ss 81, 96, 97, 300, 300(c), Exceptions 1, 4

Appeal from: Suit No 45B-7 of 2010 (High Court, Ipoh)

Nur Adilah bt Kamarzaman (Chong Joo Tian with her) (JT Chong Associates) for the appellant.
Mohamad Iskandar (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's appeal in respect of conviction and sentence of death for charge of murder of his brother in law came up for hearing on 10 September 2013 and upon hearing we dismissed the appeal on the same day. My learned brothers Azahar bin Mohamed JCA and Mohtarudin bin Baki JCA have read the draft judgment and approved the same. This is our judgment.

[2] What is important to note in this case is that (a) the witnesses who saw the incident were family members; (b) there is no allegation that some third party has committed the murder; (c) the appellant only made himself available to the police after about a month; (d) the defence of self defence and provocation patently raised in the petition of appeal will demonstrate that the appellant was the cause of the death of his brother in law; (e) the appellant's appeal essentially revolves on finding of facts.

[3] It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. In so doing if the court orders an acquittal or conviction it cannot be set-aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record. (see *Pramod Mandal v State of Bihar* [2004] 4 LRI 24; *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328).

[4] The issues raised in this case is related to whether the learned trial judge has justly and fairly considered the defence case and whether the conviction is safe.

BRIEF FACTS

[5] The appellant was watching television with his father ('SP10'), mother ('Glory'), SP14 ('relation'), the appellant's wife ('Wong Bee Yoon') and SD3 ('the appellant's sister and the wife of the deceased'). The deceased had come to the house and there was a commotion and assault and the deceased was attacked by the appellant which caused the fatal injury.

CONFLICTING VERSION

[6] There were two conflicting versions as to how the incident happened. However, as we have observed earlier this is not a case where the appellant is claiming that he was not the person who committed the offence. The evidence as well as the defence also does show that, it was the appellant who caused the death. And the learned trial judge had meticulously dealt with facts and had come to the following finding at the prosecution stage to say:

> In our present case, since I have ruled that it was the accused who had actually slashed the deceased's neck with a knife, I am more than satisfied that when the accused slashed the neck of the deceased with a knife, he had the intention to cause bodily injuries to the deceased.
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> I also find that the objective test is also satisfied when SP13 the Pathologist testified that 'looking at the extent of the injuries, especially the slash would on the left side of the neck, the deceased would have died within a few minutes due to excessive loss of blood as nearly all the vessels in the region had been cut'.
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> I therefore find that the prosecution had proved that the act of the accused was done with the intention to cause death under s 300(c) of the Penal Code.

We do not find any appealable error at the prosecution stage and the defence was rightly called.

[7] The learned counsel for the appellant in a lengthy memorandum of appeal complaint as follows:

(a) the learned High Court judge erred in law and in fact when he decided that the prosecution had succeeded in proving a prima facie case against the appellant at the end of the prosecution's case. The appellant should not have been called to defend himself;

(b) the learned High Court judge had erred in law and in fact when he failed to consider and determine that in the circumstance of this case, the appellant's action amounts to the exercise of the right to self-defence within the meaning of ss 96 and 97 of the Penal Code, in that what the appellant did on the night of the incident was for the purpose of defending the body of the appellant and members of the appellant's family from being harmed, injured or killed by the deceased who took out a knife and swung it at the direction of the appellant and members of his family, which had reasonably caused an apprehension on the part of the appellant that either death or grievous hurt would likely be caused to himself or members of his family;

(c) the learned High Court judge had erred in law and in fact when he failed to consider and determine that the appellant's action falls within s 81 of the Penal Code, in that what the appellant did on the night of the incident was for the purpose of preventing the deceased from harming the appellant and members of the appellant's family and that there was no criminal intention on the part of the appellant to cause any harm to the deceased;

(d) the learned High Court judge erred in law and in fact when he decided that the circumstantial evidence in this case is sufficient to convict the appellant when he failed to consider material and relevant matters and when he took into account irrelevant matter, in that:

(i) there was no evidence that the appellant had used any weapon to attack the deceased;

(ii) as there was conflicting version of the events given by the prosecution witnesses, the version most favourable to the appellant ought to have been adopted by the trial judge;

(iii) as there was no impeachment proceedings taken by the prosecution to impeach the credibility of SP10, it was wrong for the learned trial judge to reject SPIO's evidence as there is no rule of law which prohibits the court from accepting the evidence of a person in close family relation to the appellant;

(iv) the learned trial judge was being inconsistent and unfair to the appellant when he rejected the evidence of SP10 on the ground that he was the father of the appellant and yet accepted the written

statement of Glory, who was the appellant's mother, despite the fact that both of them are in close family relationship with the appellant. Although SP10 and Glory gave conflicting versions of the events (and neither of them was impeached by the prosecution), the learned trial judge deliberately chose the version which was most adverse and damaging to the appellant instead of the version which is most favourable to the appellant;

(v) the learned trial judge relied heavily on the evidence of SP14 whom he dubbed as a witness of truth in holding that it was the appellant who killed the deceased with a knife but all the SP14 said was that he merely saw the appellant's hand moving towards the deceased and nothing else. The learned trial judge's aforesaid conclusion was therefore based on a mere conjecture unsupported by any concrete evidence;

(vi) SP14's evidence (which was accepted by the learned trial judge) that he saw the appellant's hand moving towards the deceased was susceptible to a number of inferences. The inference most favourable to the appellant ought to have been adopted by the learned trial judge;

(vii) it was wrong for the learned trial judge to rely on the evidence of SP6 (forensic officer) that the incident took place at the porch of the house as there is clear evidence that the body of the deceased had already been removed from the crime scene prior to the arrival of SP6. The removal of the deceased's body amounted to tampering with the evidence at the crime scene and had effectively created serious doubt as to the actual location of the incident, whether it occurred inside the house, at the entrance door of the house, at the porch of the house or at the road side fronting the house. SP6's evidence as to the location of the incident was clearly influenced by the information he received from ASP Nirmala prior to commencement of his investigation;

(viii) the failure of SP6 in collecting the blood found next to the 'penyepit rambut' creates a reasonable doubt that the blood may have belonged to the actual killer and not the appellant. The prosecution had failed to rule out the possibility that the blood could have been from the person who actually killed the deceased and not the appellant;

(ix) the s 112 statement given by SP10 was not tendered by the prosecution as an exhibit and neither was there any impeachment proceedings initiated by the prosecution against SP10 on the basis of the alleged contradiction between SP10's oral evidence and his s 112 statement. In other words, SP10's evidence remained un-impeached

and his evidence as to what transpired on the day of the incident ought to have been accepted by the learned trial judge;

(x) no credence should be given to SP10's s 112 statement as it was only given by SP10 to the police after SP10 has been in remand by the police for two (2) weeks as it is highly unsafe to rely on such statements obtained after the said remand. There was obvious undue and improper pressure being placed on SP10 to make the s 112 statement after SP10 and members of his family (including his then pregnant daughter) were placed in the lock-up by the police;

(xi) the s 112 statement of Glory a/p Jacob is inadmissible as evidence and it was wrong for the learned trial judge to use the said s 112 statement for the purpose of 'showing consistency of evidence as adduced by the prosecution' because:

(1) SP15, being the investigating officer in this case, should not also act as the recording officer and the translator at the same time;

(2) the statement was highly prejudicial to the appellant and was likely to have been made under pressure as Glory was still under police remand when she purportedly gave the statement to SP15 on 7 January 2010. She was only released from remand on 9 January 2010;

(3) the admission of Glory a/p Jacob's s 112 statement as evidence at the trial was in breach of the express provision of s 113(1) of the Criminal Procedure Code.

(e) the learned High Court judge had erred in law and in fact when he failed to consider and determine that in the circumstance of this case, the appellant's action falls with the Exception (1) of s 300 of the Penal Code, in that what the appellant did was a result of the grave and sudden provocation by the deceased in hitting the head of the appellant's father and mother and in taking out a knife and swinging it at the appellant and members of his family, which action caused the appellant to lose his power of self-control at that material time;

(f) the learned High Court judge had erred in law and in fact when he failed to consider and determine that in the circumstance of the case, the appellant's action falls within Exception (4) of s 300 of the Penal Code, in that what the appellant did was without any premeditation in a sudden fight in the heat of passion upon a sudden quarrel with the deceased on the night of the incident; and

(g) in all the circumstances of this case at the end of the defence case, the learned High Court judge had erred in law and in fact when he decided

A that the prosecution had succeeded in proving its case beyond a reasonable doubt against the appellant.

[8] The learned counsel before us attempted to throw doubts as to prosecution case by highlighting (a) conflicting version; (b) 112 statement of Glory should not have been admitted; (c) witnesses were bias, etc; in relation to prosecution stage itself. We have perused the appeal record and the evidence and the factual matrix of the case at the prosecution stage and we find no appealable error on law or facts to warrant an acquittal on the basis that a prima facie case was not established at the prosecution stage as alluded in the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

[9] The other issues raised by the appellant before us was that (a) the appellant was exercising his right of self defence as provided for in ss 96 and 97 of the Penal Code; (b) the defence of grave sudden provocation as set out in Exception 4 of s 300 of the Penal Code.

[10] We do not find any merits in the defence relating to self defence. In the instant case the deceased was not an outsider intruding into the premise. He was the appellant's own brother in law and the injury inflicted was at the neck and it is difficult for any reasonable tribunal to find that s 96 of the Penal Code will be applicable in the instant case as the injury will indicate it is punitive in nature. In *Alandu a/l Santhanasamy v Public Prosecutor* [2014] 2 MLJ 508 (A-05–334/2011), Hamid Sultan bin Abu Backer JCA in relation to self defence had this to say:

> The threshold requirement to satisfy the defence of self defence is very high. The evidence in the instant case shows that the appellant had entered the premise of the victim and had a quarrel which led to brutal injury which caused the death of the victim. On such facts at least it must be shown that the victim was the assailant and there was no opportunity for the appellant to escape and/or if any attempt to escape would have been futile. It would have been different if the victim had entered the appellant's premise with arms and subsequently there was a quarrel and assault and in the moment of heat, injuries were caused which led to death and the conduct was not punitive in nature. In such circumstances the appellant need not show that he could have escaped from his own house. The facts of the case will show that it was the appellant who entered the victims house and not otherwise (see *Rozmi bin Yusof v Public Prosecutor* [2013] 5 MLJ 66).
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> Further, the nature of injury will also not assist the appellant to rely on s 102. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence committed by him. Section 102 is said to be preventive and not punitive right. (see *Nandi Criminal Law Referencer*, Vol 3, (3rd Ed) p 283).

[11] Notwithstanding the learned counsel for the appellant has not taken us through all the grounds stated in the petition of appeal, we have taken the liberty to go through the grounds and the evidence and we are satisfied there is no merits in the appeal.

[12] We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test, (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827).

[13] We are of the considered view it is a safe decision and appellate intervention is not warranted and the appeal has no merit. Accordingly we dismiss the appeal.

We hereby order so.

Appeal dismissed.

Reported by Kohila Nesan